

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 15, 2009

STATE OF TENNESSEE v. RICHARD LEE KIZER

Appeal from the Criminal Court for Hamilton County
No. 269209 Barry A. Steelman, Judge

No. E2009-01433-CCA-R3-CD - Filed February 25, 2010

The defendant, Richard Lee Kizer, appeals from the trial court's revocation of his probation and imposition of his full sentence for domestic aggravated assault. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Ardena J. Garth, District Public Defender (on appeal); Richard Kenneth Mabee, Assistant District Public Defender (on appeal); and Mary Ann Green, Assistant District Public Defender (at trial), for the appellant, Richard Lee Kizer.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William H. Cox, District Attorney General; and C. Matthew Rogers, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On July 2, 2008, the defendant fired a handgun in the direction of his mother, Anne Kizer. A Hamilton County grand jury indicted the defendant for one count of attempted first degree premeditated murder of Ms. Kizer, *see* T.C.A. § 39-13-202 (2006), and for one count of domestic aggravated assault for the same incident, *see id.* § 39-13-102; *see also id.* § 36-3-601(5) (2005). Pursuant to a plea agreement between the parties, the State dismissed the attempted first degree murder count, and the defendant pleaded guilty to the domestic aggravated assault charge in exchange for a three-year sentence with the Tennessee Department of Correction ("TDOC") as a Range I, Standard Offender. Pursuant to the

agreement, the defendant was required to serve 11 months, 29 days of incarceration with the remainder of the sentence to be served on supervised probation. The agreement also required that the defendant undergo drug and alcohol evaluations and that he refrain from consuming alcohol. On October 9, 2008, the trial court accepted the plea agreement and entered a judgment of conviction reflecting the terms of the agreement.

Jamie Bollig, the defendant's probation officer, filed a Probation Violation Report on March 24, 2009. The report reflected that the defendant had failed to inform his probation officer of changes in his residence and that he had failed to report. The Probation Violation Report further alleged three instances of the defendant's consuming alcohol in violation of his probation and his failure to obtain drug and alcohol evaluations. Based on Ms. Bollig's report, the trial court issued a capias warrant for the defendant on March 31, 2009, and the defendant was taken into custody on April 21, 2009.

The trial court conducted a revocation hearing on June 8, 2009. Ms. Bollig testified that the defendant was assigned to her on December 31, 2008. She explained that she granted the defendant permission to leave Hamilton County to enter Recovery Community's drug and alcohol treatment program in Nashville because the completion of drug and alcohol treatment was a condition of his probation. She testified that Recovery Community accepted the defendant on January 4, 2009, but that on February 19, 2009, personnel there discovered the defendant drinking and in possession of alcohol.

Ms. Bollig testified that the defendant was discharged from Recovery Community and then moved into a program named Re-Entry on February 20, 2009. She maintained that the defendant did not inform her of his moving to Re-Entry. Re-Entry's personnel found the defendant under the influence of alcohol on March 3, 2009, and the program permitted his admission to Baptist Hospital for three days' detoxification. Re-Entry allowed the defendant to return, but personnel discovered the defendant drinking again on March 13, 2009, and dismissed him from the program. Ms. Bollig testified that a contact at Re-Entry informed her that the defendant had been arrested for criminal trespass. She testified that the defendant did not inform her of this charge until April 13, 2009, nearly a month after the charge was dismissed on March 16, 2009.

Ms. Bollig testified that she contacted the defendant via his cellular telephone on March 17, 2009, and that the defendant refused to disclose his location to her. Ms. Bollig testified that the defendant called her at a later date to inform her that he was entering treatment at an institution named Turning Point. She discovered that Turning Point also dismissed the defendant for abuse of alcohol.

Ms. Bollig characterized the defendant's attitude toward probation as "pretty

much defiant.” She testified that the defendant was never employed while under supervision.

On cross-examination, Ms. Bollig described the circumstances surrounding the defendant’s arrest for criminal trespass. The affidavit of complaint reported that, after the defendant was asked to leave Baptist Hospital in Nashville, he returned to the lobby with his belongings, and hospital personnel notified the police. Ms. Bollig also admitted that she had frequent telephone contact with the defendant; however, she maintained that she initiated most of the calls.

Ms. Bollig testified that the defendant reported attending approximately five or six alcohol treatment programs from 2000 to 2008. The defendant also told Ms. Bollig that he had been diagnosed with depression and anxiety and had been prescribed Klonopin, a benzodiazepine, and Clonidine, a blood-pressure medication.

The defendant testified that both Recovery Community and Re-Entry were halfway houses and not drug and alcohol treatment programs. He stated that the directors of Recovery Community told him that if he completed 30 days at Re-Entry, he could return to Recovery Community. He explained that he informed staff at Re-Entry that he had prescriptions for Klonopin and Lunesta, a sedative. The defendant explained that his Klonopin prescription treated his anxiety and sleep disorder. He testified that he had also been diagnosed with bipolar disorder and had been prescribed medication for its treatment. The Re-Entry personnel informed him that he could not take these medications during his stay, “so . . . [he] started taking just over-the-counter cough medicine.” He stated that, because the medicine contained alcohol, “[he] was asked to leave for two days about two weeks after . . . entering there.” He said that he returned to Re-Entry, but “a couple weeks later [he] was asked to take a urinalysis, which [he] refused to take because . . . [he] had started taking [his] Klonopin again.” The defendant stated that he then left Re-Entry of his own decision.

The defendant admitted that, after leaving Re-Entry and before entering Turning Point, he lived in a hotel and began drinking alcohol. He had attempted to enter PathFinders, a full rehabilitation program. He stated that he called Ms. Bollig and told her that he “was slipping and [he] really needed to get to inpatient rather than just be in the halfway house and free to go about and do whatever [he] wanted to do.” The defendant testified that he worked part-time for a professor at Vanderbilt University during this time.

The defendant testified that he had twice completed a 28-day rehabilitation program at PathFinders but that he failed to enter a halfway house after treatment and “eventually went back into the same behaviors.” He testified that PathFinders had accepted his application for a third treatment session and that he had “a bed available there right now.”

He testified that, if allowed to enter PathFinders, he would enter a halfway house upon completion of the rehabilitation program.

The defendant admitted being arrested twice in Nashville for criminal trespass, but he denied that alcohol was a factor in either arrest. He testified that both of the charges were dismissed. He explained that one arrest occurred in the hospital lobby and that the other involved a fast food restaurant.

The defendant testified that he had child support obligations and that his family had paid a "\$2,000 purge last Wednesday for that child support obligation . . . so it has been taken care of." The defendant also testified that, at the time of the hearing, he was only taking blood-pressure medication. The defendant maintained that he attempted to contact Ms. Bollig with his changes of address, but he admitted that he "messed up a couple of times."

On cross-examination, the defendant maintained that he had been taking cough syrup, and not drinking alcohol, on March 13, 2009, when he was dismissed from Re-Entry. He also maintained that on March 6, 2009, he had not been drinking and that he went to the hospital to have chest pains treated and not for detoxification.

The defendant admitted that he was dangerous to his family when he drank alcohol. He admitted that he was convicted of child endangerment for wrecking a vehicle in which his children were passengers while he was drunk.

The defendant denied that, in the current case, he was drinking alcohol and shot a gun at his mother. He maintained that he was "under the influence of [his] . . . medication" and that "[a] gun went off but [he] did not fire a gun at [his mother]." He admitted holding the gun when it fired, but he stated that it "[a]ccidentally went off." The defendant explained that he and his mother had "a simple argument about the temperature in the house." He stated that he had a Colt .22 handgun that he was no longer permitted to possess due to another "domestic assault case." He said that he was bringing the gun from his room and "was taking it back out to be locked in . . . a cabinet in the garage." He testified that he had "cocked the hammer back, and opened up so that the cylinder would spin and starting pulling the shells out of there." He stated that this frightened his mother, who walked out the door. He said, "I saw her go around the corner and on up the driveway, and I . . . pulled the hammer back, and the hammer went down onto one of the cartridges." He maintained that he never threatened his mother with the gun.

The defense called the defendant's father, Fred Kizer, who testified that the defendant "c[ould] stay at [his parents'] place as long as he likes, as long as he's drug-free

and alcohol-free.” He testified that he would transport the defendant to PathFinders for treatment. Mr. Kizer testified that the relationship between the defendant and Ms. Kizer, his mother, was “[g]ood.” Mr. Kizer testified that he and Ms. Kizer paid the child support owed by the defendant. He testified that he believed the defendant “will do better” and that the defendant realized that “he’s hit rock bottom.”

Mr. Kizer recounted his wife’s version of the incident leading to the defendant’s conviction. He said that Ms. Kizer said that the defendant “had taken medicine or something and he was high.” She said that the defendant then broke into Mr. Kizer’s tool box in the garage to get one of his guns and that the defendant threatened to shoot her. Ms. Kizer then ran out the back door, and the defendant fired the gun through the back door. Ms. Kizer then hid from the defendant and eventually went to Mr. Kizer’s mother’s house, which was also located in the neighborhood. The police arrested the defendant, who had traveled to Mr. Kizer’s mother’s house holding a black bag. The officers found the gun under some bushes in front of the home.

Mr. Kizer testified that the defendant generally was not violent and that he only threatened violence when “he was high on his pills and alcohol and vodka and stuff.” He testified that on one occasion two or three years earlier, the defendant attempted to strike Ms. Kizer, and Mr. Kizer held him down until the police arrived.

On cross-examination, he admitted to an occasion when the defendant attempted to strike Ms. Kizer with a cane. He also stated that the defendant commonly drank vodka while abusing hydrocodone pills.

The trial court found that the defendant violated the terms of his probation by absconding when he left Recovery Community without informing Ms. Bollig. The court found that the defendant “was evasive with the probation officer” during his time in Nashville. The trial court credited Ms. Bollig’s testimony over the defendant’s in its determinations. It also found that the defendant “drank himself out of” his programs in Nashville. The court explained,

Had you not fired a gun at your mother, then I might be in a position to give you another opportunity, but I’m not going to put them back into that situation, because the first time you violate because you are drunk, it endangers their life for them to call the police.

The court ordered that the defendant serve the remainder of his original three-year sentence in the TDOC.

The defendant appeals the trial court's revocation of his probation. The defendant's brief does not challenge the court's finding that he violated his probation. Rather, the defendant argues that the trial court erred in not ordering that he serve an alternative sentence requiring substance abuse treatment in light of his drug and alcohol addictions.

A trial court may revoke a sentence of probation upon a finding by a preponderance of the evidence that the defendant has violated the conditions of his release. T.C.A. § 40-35-311(e) (2006); *Stamps v. State*, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). A revocation will be upheld absent a showing that the trial court abused its discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). "In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." *Id.* (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)); *see also State v. Thomas Walter Lockhart*, No. E2008-01712-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 5, 2009). Relief will be granted only when "the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved." *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). Upon finding a violation, the trial court may "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." T.C.A. § 40-35-311(e). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." *Id.* § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

In light of our standard of review, we cannot say that the trial court abused its discretion in revoking the defendant's probation. The defendant admitted violating the terms of his probation by drinking alcohol, obviously violating a special term of his probation. Further, the court found, and the record supports, that the defendant absconded from his probation by evading his parole officer. The defendant also failed to timely report two arrests. The defendant essentially asks this court to reverse the trial court's revocation and reinstate his probationary sentence so that he can again pursue treatment. We have no authority to do so in light of his clear violations of his probationary terms. We affirm the judgment of the trial court.

JAMES CURWOOD WITT, JR., JUDGE